



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 222

[Docket No. 230119-0018]

RIN 0648-BL37

#### 2023 Annual Determination to Implement the Sea Turtle Observer Requirement

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final determination.

**SUMMARY:** The National Marine Fisheries Service (NMFS) hereby publishes the final Annual Determination (AD) for 2023, pursuant to its authority under the Endangered Species Act (ESA). Through the AD, NMFS identifies U.S. fisheries operating in the Atlantic Ocean, Gulf of Mexico, and Pacific Ocean in which participants will be required to take fisheries observers upon NMFS' request. The purpose of observing identified fisheries is to learn more about sea turtle bycatch in a given fishery, evaluate measures to prevent or reduce sea turtle takes, and implement the prohibition against sea turtle takes. Fisheries identified on the 2023 AD (see Table 1) will be required to carry observers upon NMFS' request, and will remain on the AD for a 5-year period until December 31, 2027.

**DATES:** This final determination is effective [*insert date 30 calendar days after date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** Chief, Marine Mammal and Sea Turtle Conservation Division, Attn: Sea Turtle Annual Determination, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Jaclyn Taylor, Office of Protected Resources, 301-427-8402; Ellen Keane, Greater Atlantic Region, 978-282-8476; Dennis Klemm, Southeast Region, 727-824-5312; Dan Lawson, West Coast Region, 206-526-4740; Irene Kelly, Pacific Islands Region, 808-725-5141. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Purpose of the Sea Turtle Observer Requirement**

Under the ESA, 16 U.S.C. 1531 *et seq.*, NMFS has the responsibility to implement programs to conserve marine life listed as endangered or threatened. All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*; North Pacific distinct population segment (DPS)), leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*; Central West Pacific and Central South Pacific DPSs) and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (Northwest Atlantic distinct population segment), green (North Atlantic, South Atlantic, Central North Pacific, and East Pacific DPSs), and olive ridley (*Lepidochelys olivacea*) sea turtles are listed as threatened, except for breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. Due to the inability to distinguish between populations of olive ridley turtles away from the nesting beach, NMFS considers these turtles endangered wherever they occur in U.S. Pacific waters. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Bycatch in fishing gear is the primary anthropogenic source of sea turtle injury and mortality in U.S. waters. Section 9 of the ESA prohibits the take (defined to include

harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of endangered sea turtles. Pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Section 11 of the ESA provides for civil penalties and criminal penalties for anyone who knowingly violates the Act or a regulation issued to implement the ESA. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine the activity that will result in incidental take is not likely to jeopardize the continued existence of the affected listed species. For some Federal fisheries and most state fisheries, NMFS has not granted an exception for incidental takes of sea turtles primarily because we lack information about fishery-sea turtle interactions.

For most fisheries, the most effective way for NMFS to learn more about bycatch in order to implement the take prohibitions and prevent or minimize take is to place observers aboard fishing vessels. In 2007, NMFS issued a regulation (50 CFR 222.402) establishing procedures to annually identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers (72 FR 43176; August 3, 2007). These regulations specify that NMFS may observe fisheries, commercial or recreational, operating in U.S. territorial waters, the U.S. exclusive economic zone (EEZ), or on the high seas or on vessels that are otherwise subject to the jurisdiction of the United States. Failure to comply with the requirements under these regulations may result in civil or criminal penalties under the ESA.

NMFS will pay the direct costs for vessels to carry the required observers. These include observer salary and insurance costs. NMFS may also evaluate other potential direct costs, should they arise. Once selected, a fishery will be required to carry

observers, if requested, for a period of five years without further action by NMFS. This will enable NMFS to develop appropriate observer coverage and sampling protocols to investigate sea turtle bycatch, and to evaluate whether existing measures are minimizing or preventing bycatch.

### **Sea Turtle Distribution**

NMFS uses information on sea turtle distribution and habitat use to inform the development of the final AD. A summary of this information was included in the proposed AD (87 FR 54948; September 8, 2022) and was considered in developing the final 2023 AD.

### **Process for Developing the Annual Determination (AD)**

Pursuant to 50 CFR 222.402, NOAA's Assistant Administrator for Fisheries (AA), in consultation with Regional Administrators and Fisheries Science Center Directors, develops a proposed AD identifying which fisheries are required to carry observers, if requested, to monitor potential interactions with sea turtles. NMFS provided an opportunity for public comment on the proposed determination (87 FR 54948; September 8, 2022). The determination is informed by the best available scientific, commercial, or other information regarding sea turtle-fishery interactions; sea turtle distribution; sea turtle strandings; fishing techniques, gears used, target species, seasons and areas fished; and/or qualitative data from logbooks or fisher reports. Specifically, fisheries are identified on the AD based on the extent to which:

- (1) The fishery operates in the same waters and at the same time as when sea turtles are present;
  - (2) The fishery operates at the same time or prior to elevated sea turtle strandings;
- or
- (3) The fishery uses a gear or technique that is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or

similar fisheries; and

(4) NMFS intends to monitor the fishery and anticipates that it will have the funds to do so.

The AA used the most recent version of the annually published Marine Mammal Protection Act (MMPA) List of Fisheries (LOF) as the comprehensive list of commercial fisheries for consideration. The LOF includes all known state and Federal commercial fisheries that occur in U.S. waters and on the high seas. However, in preparing the AD, we do not rely on the three-part MMPA LOF classification scheme. In addition, unlike the LOF, the AD may include recreational fisheries likely to interact with sea turtles based on the best available information.

NMFS consulted with appropriate state and Federal fisheries officials to identify which fisheries, both commercial and recreational, to consider. NMFS carefully considered all recommendations and information available for developing the AD. The AD is not an exhaustive or comprehensive list of all fisheries with documented or suspected sea turtle bycatch. NMFS will not include a fishery on the AD if that fishery does not meet the criteria for inclusion on the AD (50 CFR 222.402(a)).

For many fisheries, NMFS may already be addressing bycatch through another mechanism (*e.g.*, rulemaking to implement modifications to fishing gear and/or practices), may be observing the fishery under a separate statutory authority, or will consider including them in future ADs based on the four previously noted criteria (50 CFR 222.402(a)). The fisheries not included on the 2023 AD may still be observed by NMFS fisheries observers under different authorities (*e.g.*, MMPA, Magnuson–Stevens Fishery Conservation and Management Act (MSA)) than the ESA, if applicable.

NMFS publishes the final determination in the ***Federal Register*** and individuals permitted for each fishery identified on the AD will receive a written notification. NMFS will also notify state or territory agencies. Once included in the final determination, a

fishery will remain eligible for observer coverage for a period of five years to enable the design of an appropriate sampling program and to ensure collection of sufficient scientific data for analysis. If NMFS determines a need for more than five years to obtain sufficient scientific data, NMFS will include the fishery in a subsequent proposed AD, prior to the end of the fifth year.

On the 2018 AD, NMFS identified two fisheries and required them to carry observers, if requested, through December 31, 2022. The 2020 AD identified four additional fisheries and required them to carry observers, if requested, through September 29, 2025. The fisheries included on the current AD are available at <https://www.fisheries.noaa.gov/national/bycatch/sea-turtle-observer-requirement-annual-determination>.

## **Comments and Responses**

NMFS received 14 comment letters on the proposed AD (87 FR 54948; September 8, 2022). All commenters were members of the public. All commenters expressed general support of the regulation or fishery observer programs. All substantive comments are addressed below. Comments on issues outside the scope of the AD were noted but are not responded to in this final determination.

### *General Comments*

*Comment 1:* Twelve commenters expressed general support for the regulation.

*Response:* NMFS agrees and has included two fisheries on the 2023 AD to allow for increased data collection on sea turtle bycatch to accomplish the purposes of the regulation.

### *Recommendations for Fisheries to Include on the 2023 AD*

*Comment 2:* One commenter was supportive of the regulation but recommends NMFS include a fishery in the Pacific Ocean on the 2023 AD. The commenter noted that adding a Pacific fishery will allow NMFS to cover fisheries the Atlantic, Pacific, and Gulf

of Mexico.

*Response:* NMFS acknowledges that there are other fisheries, in addition to those included on the 2023 AD, that have the potential to incidentally take sea turtles. The 2023 AD is not meant to be a comprehensive list of fisheries that have sea turtle bycatch or fisheries that require monitoring, but rather a focused list, based on specific inclusion criteria, one of which is based on available funding (see Purpose of the Sea Turtle Observer Requirement section). NMFS is not including a Pacific fishery on the 2023 AD because none of the fisheries in the Pacific met all of the inclusion criteria.

#### *Observer Coverage*

*Comment 3:* A commenter was supportive of the regulation but raised concern over what NMFS' standards were for distributing and placing observers among fisheries on the AD. The proposed rule stated "That no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage." The commenter questioned what would make observer coverage inappropriate or excessive.

*Response:* When using the AD authority to observe a fishery, NMFS will work within the current observer programs and follow the observer program's standards and observer placement design requirements. Pursuant to 50 CFR 222.404, NMFS will follow the standards for distributing and placing observers: (1) The requirement to obtain the best available scientific information; (2) The requirement that observers be assigned fairly and equitably among fisheries and among vessels in a fishery; (3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and (4) The need to minimize costs and avoid duplication, where practicable. For example, Northeast Fisheries Observer Program (NEFOP) coverage is determined by an annual discard analysis and sea day allocation report required by the Standardized Bycatch Reporting Methodology (SBRM) Amendment. Trips are assigned based on effort. As there is no pre-trip notification

requirement for these fleets, guidance is provided to the contract holder which estimates coverage based on that year's sea day schedule and prior years effort. There are regulations in the SBRM amendment and the contract that prevents individual vessels from being covered in a biased manner.

### *Recreational Fisheries*

*Comment 4:* A commenter stated that the AD does not include information on how an observer program would be implemented for recreational fisheries from public piers. They noted that several fishing piers in the Gulf of Mexico have a high rate of sea turtle bycatch. The Loggerhead Marine Life Center in Florida has a responsible pier initiative program. The commenter stated that this data can provide information on sea turtle bycatch off piers and NMFS can use that information to use the AD for recreational fisheries occurring on piers.

*Response:* NMFS acknowledges that there are other fisheries (commercial and recreational), in addition to those included on the 2023 AD, that have the potential to take sea turtles. The 2023 AD is not meant to be a comprehensive list of fisheries that have sea turtle bycatch or fisheries that require monitoring, but rather a focused list, based on specific inclusion criteria, one of which is based on available funding (see Purpose of the Sea Turtle Observer Requirement section). NMFS is not including shore-based recreational fisheries on the 2023 AD because none of the fisheries met all of the inclusion criteria. NMFS and our partners (including those in the Sea Turtle Stranding and Salvage Network) are trying to learn more about how sea turtles interact with recreational fishing gear - see additional information on our Sea Turtle and Recreational Fishing website here: <https://www.fisheries.noaa.gov/national/marine-life-distress/sea-turtles-and-recreational-fishing>.

### **Fisheries Included on the 2023 Annual Determination**



NMFS includes two fisheries in the Atlantic Ocean/Gulf of Mexico on the 2023 AD. The two fisheries, listed in Table 1, are the mid-Atlantic gillnet and Gulf of Mexico menhaden purse seine fisheries. These two fisheries were previously listed on the 2018 AD for a five-year period ending December 31, 2022. NMFS includes these fisheries pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD because sea turtles are known to occur in the same areas where the fishery operates, takes have been documented in this fishery, and NMFS intends to monitor this fishery.

NMFS used the 2022 MMPA LOF (87 FR 23122; April 19, 2022) as the comprehensive list of commercial fisheries to evaluate for fisheries to include on the AD. The fishery name, definition, and number of vessels/persons for fisheries listed in the AD are taken from the most recent MMPA LOF. Additionally, the fishery descriptions below include a particular fishery's current classification on the MMPA LOF (*i.e.*, Category I, II, or III); Category I and II fisheries are required to carry observers under the MMPA, if requested by NMFS. As noted previously, NMFS also has authority to observe fisheries in Federal waters under the MSA and collect sea turtle bycatch information. The AD authority will work within the current observer programs, and allow NMFS the flexibility to further consider sea turtle data collection needs when allocating observer resources.

A summary of information about the mid-Atlantic gillnet and Gulf of Mexico menhaden purse seine fisheries was included in the proposed AD (87 FR 54948; September 8, 2022) and was considered in developing the final 2023 AD.

### **Implementation of Observer Coverage in a Fishery Listed on the 2023 AD**

As part of the 2023 AD, NMFS has included, to the extent practicable, information on the fisheries and gear types to observe, geographic and seasonal scope of coverage, and any other relevant information. NMFS intends to monitor the fisheries and anticipates that it will have the funds to support observer activities. After publication of the final determination, there will be a 30-day delay in the date of effectiveness for

implementing observer coverage, see **DATES**.

The design of any observer program for fisheries identified through the AD process, including how observers will be allocated to individual vessels, will vary among fisheries, fishing sectors, gear types, and geographic regions, and will ultimately be determined by the individual NMFS Regional Office, Science Center, and/or observer program. Pursuant to 50 CFR 222.404, during the program design, NMFS will follow the standards below for distributing and placing observers among fisheries identified in the AD and among vessels in those fisheries:

- (1) The requirement to obtain the best available scientific information;
- (2) The requirement that observers be assigned fairly and equitably among fisheries and among vessels in a fishery;
- (3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and
- (4) The need to minimize costs and avoid duplication, where practicable.

Vessels subject to observer coverage under the AD must comply with observer safety requirements specified in 50 CFR 600.725 and 600.746. Specifically, 50 CFR 600.746(c) requires vessels subject to observer coverage to provide adequate and safe conditions for carrying an observer and conditions that allow for operation of normal observer functions. To provide such conditions, a vessel must comply with the applicable regulations regarding observer accommodations (see 50 CFR parts 229, 300, 600, 622, 635, 648, 660, and 679) and possess a current United States Coast Guard (USCG) Commercial Fishing Vessel Safety Examination decal or a USCG certificate of examination. A vessel that fails to meet these requirements at the time an observer is to be deployed may be prohibited from fishing without observer coverage under 50 CFR 600.746(i). Observer programs designed or carried out in accordance with 50 CFR 222.404 are consistent with existing NOAA observer policies and applicable federal

regulations, such as those under the Fair Labor and Standards Act (29 U.S.C. 201 *et seq.*), the Service Contract Act (41 U.S.C. 351 *et seq.*), and the Observer Health and Safety regulations (50 CFR part 600).

Additional information on observer programs in commercial fisheries is available on the NMFS National Observer Program's website:

<https://www.fisheries.noaa.gov/topic/fishery-observers>.

**Table 1 -- State and Federal Commercial Fisheries included on the 2023 Annual**

**Determination**

Fishery	Years Eligible to Carry Observers
<u>Purse Seine Fisheries</u>	
Gulf of Mexico menhaden purse seine	2023-2027
<u>Gillnet Fisheries</u>	
Mid-Atlantic gillnet	2023-2027

## **Classification**

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. No comments were received on that certification, and no new information has been discovered to change that conclusion. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

This regulation contains existing collection-of-information (COI) requirements subject to the Paperwork Reduction Act and would not impose additional or new COI requirements. The information collection for the AD is approved under Office of Management and Budget (OMB) control number 0648-0593. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

This regulation has been determined to be not significant for the purposes of Executive Order 12866.

In accordance with the Companion Manual for NOAA Administrative Order (NAO) 216–6A, NMFS determined that publishing the AD qualifies to be categorically excluded from further National Environmental Policy Act (NEPA) review, consistent with categories of activities identified in Categorical Exclusion G7 (“Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis”) of the Companion Manual, and we have not identified any extraordinary circumstances listed in

Chapter 4 of the Companion Manual for NAO 216-6A that would preclude application of this categorical exclusion. If NMFS takes a management action for a specific fishery, for example, requiring fishing gear modifications, NMFS would first prepare any environmental document specific to that action that is required under NEPA.

This regulation would not affect species listed as threatened or endangered under the ESA or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this regulation would not affect the conclusions of those opinions. The inclusion of fisheries on the AD is not considered a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, requiring modifications to fishing gear and/or practices, NMFS would review the action for potential adverse effects to listed species under the ESA.

This regulation would have no adverse impacts on sea turtles, and information collected from observer programs may have a positive impact on sea turtles by improving knowledge of sea turtles and the fisheries interacting with sea turtles.

This regulation would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

Dated: January 19, 2023.

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Samuel D. Rauch, III

Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.